No. 8809

In the United States Circuit Court of Appeals

for the Ninth Circuit

JOE MAZUROSKY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

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United States Attorney for
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J. MASON DILLARD,
M. B. STRAYER,
Assistant United States Attorneys
for the District of Oregon.
506 U. S. Court House, Portland, Ore.,
Attorneys for Appellee

EDWIN D. HICKS,
HICKS & ADAMS,
515 Pacific Building, Portland, Ore.,
Attorneys for Appellant.

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COMES NOW the United States of America, through Carl C. Donaugh, United States Attorney for the District of Oregon, and his Assistants, M. B. Strayer and J. Mason Dillard, and respectfully petitions the court for a rehearing. We are apprehensive that the Government, in its brief, has not discussed in sufficient detail the evidence pertaining to the two elements upon which the Court of Appeals has reversed the decision of the trial court.

The case is one which, as revealed by the record, was tried with extreme fairness under the supervision of the

trial judge. It will be noted from the record that before retiring for its deliberations the jury received studiously fair and comprehensive instructions. The motion for a directed verdict was carefully considered and denied.

The opinion of the Court of Appeals, if we interpret it correctly, is based upon two principles. The first is that with respect to Count Four of the indictment there is insufficient evidence to reveal knowledge on the part of the appellant, Mazurosky. The second is that with respect to Counts Seven and Eight of the indictment the prosecution has failed to show in the evidence an intent by the conspirators to use the United States Mail.

In support of this petition for re-hearing we respectfully submit three points for the consideration of the Court:

I

It is the opinion of the court that the prosecution has failed to show substantial evidence of knowledge. With respect to this, we ask the court to consider the evidence in greater detail.

II

There is substantial evidence of intent to use the mails as applied to Counts Seven and Eight of the indictment.

III

There is substantial evidence in the record to support

the finding of the jury with respect to each necessary element.

ARGUMENT

POINT I

Respecting knowledge, appellee directs attention to authorities submitted in its brief in this cause and submits in addition thereto a more detailed discussion of the testimony. First, we ask consideration of the Court of Appeals of the undisputed fact that the appellant was fully advised concerning the nature of the swindle engaged in by his co-conspirators, as evidenced by the testimony of the witness Wagner (Tr. p. 83) and further by the testimony of the witness, John Goltz (Tr. pp. 73, 74), in which the appellant stated to John Goltz, a police officer of the city of Portland, that he knew "them fellows." It is noted that one of "them fellows" to whom the defendant referred was O. A. Plummer. Though there is no evidence in the record on behalf of the appellant, the appellant argued that this was an innocent transaction. We think this circumstance is inconsistent with innocence. By his own admission the appellant received the check from a person (Nelson) with whom he was acquainted, seeing plainly that it was made out to a fictitious person, and upon inquiry falsely stating that he knew O. A. Plummer. Though the appellant, a business man, affixed his en-

dorsement "Joe Mazurosky" to this check and went so far as to threaten the maker thereof with action to collect the same, and having known both of the operators of the swindle, Nelson and Doctor Brown (Tr. p. 74, line 8), appellant still contends a lack of knowledge. Appellant professes to be a business man, yet he accepted a check, prior to the offenses charged herein, the last endorsement of which is "O. A. Plummer," which he knew was a fictitious name, and immediately thereafter not only an outraged victim of the fraud but a police detective of the City of Portland interviewed him with respect to the same (Tr. p. 74). The victim at that time informed the appellant in detail concerning the method by which he was swindled. Appellant therefore knew, as far back as 1925, that Nelson was engaged in defrauding victims by means of the "eye racket" and his later conversations with Nelson, in which he asked "How are the suckers, Slats?" are consistent with knowledge on his part during all of the years of his acquaintance with Nelson that Nelson was continuing in that line of business.

The first transaction which is the subject of this indictment occurred in 1934. Not only had the appellant been fully advised of the trick and swindle (Tr. p. 83), but he had been on intimate terms with Nelson, a co-swindler, as noted in the opinion of this court. But, in December of 1934, having received the fruits of the crime,

appellant was again advised that the fruits of the crime were obtained "in a bunko game." (Tr. p. 104). In addition to that, the appellant made the statement, under all of the circumstances of an interview by a police detective of the Portland Police Bureau, that the party was a doctor (Tr. p. 104, line 16).

This evidence reveals a studied attempt on the part of the appellant to conceal the identity of the party from whom he received the check. This concealment of the identity of the bunco men was an integral part of the scheme and essential to its success. It is submitted as evidence to show knowledge and concealment.

The negotiable instrument then under discussion was endorsed "H. J. Pierce," "O. C. Stone," "Joe Mazurosky" (Govt. Ex. 1). It is apparent from the record that the business man, Mazurosky, knew no "H. J. Pierce," knew no "O. C. Stone," and the fact remains that he accepted the check. Concerning that check, the appellant said he didn't know the whereabouts of the party who gave the check to him, which is further evidence of an attempt to conceal the identity of the bunco men.

Thereafter many circumstances are revealed in the evidence, undisputed, showing knowledge on the part of the appellant. Some of these are as follows:

In 1935 the appellant told one of his co-conspirators,

Nelson, that 10% commission for cashing the checks was not enough; that the checks were "getting a little hot and he would have to have more commission."

Communication between the appellant and Frank Nelson is revealed by the facts concerning the Belter check. When received by the swindler, the maker, Belter, had no funds in the bank and so informed Frank Nelson (Tr. 55). When the check was presented at the bank by the appellant, for a second time, instructions were given to hold the check for a few days, if necessary. While the evidence does not disclose by whom these instructions were given, we are entitled to infer that they were given by the appellant. This, we think, reveals that the appellant had communicated with Nelson and, having received the check back once unpaid, presented it again with assurance that it would be paid in the near future. Appellant could have obtained this information from no other source than through communication with Nelson.

Contrary to usual banking practice, the check was sent through "no protest" at the request of the appellant (Tr. p. 110). This, we think, is not consistent with a good faith business transaction, but is evidence from which the jury might infer appellant had full knowledge that the check was not supported by legal consideration and that no legal action could be taken to collect the same if it was not paid.

An additional undisputed fact concerning the Belter check is that the last endorser prior to the endorsement of the appellant is "J. C. Adams." The appellant's co-conspirator, Nelson, sent this check to him by mail under his true name of Nelson (Tr. p. 65, line 7). The same state of facts applies to the Deibert check (Govt. Ex. 26) as revealed by the testimony of Nelson (Tr. p. 60). In other words, the appellant well knew that J. C. Adams, payee of each of these checks, was a fictitious person. In addition, when interviewed by police officers seeking to identify "Adams," the payee of the Deibert check, the appellant stated that he had known him for sixteen years, but the appellant concealed the true identity of his co-conspirator, Nelson, in 1934. Again we find the appellant fulfilling his part in the scheme by concealing the identity of the bunco men.

When the appellant was interviewed by Police Detective Powell regarding the Deibert check, he informed Powell that "Adams" was an eye specialist (Tr .78), and on the same occasion he stated to Police Detective Williams (Tr. 80) that "Adams" was known to him as "Slats" and that he worked with Dr. Brown about sixteen years ago in the "eye specialist bunk." His statement that "Adams" had come into the store and asked him to cash a check was false. This evidence, we believe, is consistent with no other theory but that of guilty knowledge upon

his part that "Adams" was actually Frank Nelson and that he was engaged in the eye specialist racket at that time.

The appellant received 15% commission for cashing some of the checks (Tr. p. 90). We think that fact is not consistent with the theory that the appellant engaged in a good faith business transaction.

Further, to show knowledge on the part of Joe Mazurosky, the testimony of Herman Horack (Tr. p. 104) is offered to the effect that in December, 1934, appellant was informed by police officers of the City of Portland that the Mershon check (Govt. Ex. 1) received from "O. C. Stone," a fictitious person, was obtained in a bunco game. The appellant's statements to police officers (Tr. p. 106) concerning this check were false and concealing.

He communicated with another co-conspirator, Martin, addressing him as R. E. Terrill, and himself using the name of Morris (Tr. p. 130). He admitted to a United States Post Office Inspector that he knew the checks were obtained in some kind of a fraud (Tr. 132), and having been repeatedly informed of the nature of that fraud, both by police officers and by an outraged victim, we submit that there is evidence from which the jury might infer and find complete knowledge, sufficient to support its verdict, and all of these circumstances are inconsistent with innocence.

POINT II

Respecting the intent of the appellant and co-conspirators to use the mails, which is concededly a necessary element of proof to support the conspiracy counts of the indictment, we submit that the best evidence thereof is found in the fact that both the appellant and his co-conspirators did make direct use of the United States Mails by personally depositing letters in the United States Mails. (Tr. p. 50). Furthermore, appellant, being a business man, transacting business with three banks, certainly knew the practice of banks with respect to using the mails in the exchange of checks.

Again, in 1934, Joe Mazurosky specifically requested that the United States National Bank of Portland send one of the checks to Denver, Colorado, air mail (Tr. p. 120). As late as 1935 he told another bank to send one of the checks direct to the Kennewick, Washington, bank (Tr. p. 109). We offer these instances in connection with the accepted rule that a man intends the ordinary consequences of his act.

POINT III

We ask the consideration of the court of the following general principles as applicable to the instant case:

(1) The jurors are the judges of the weight of the tes-

timony and their verdict will not be disturbed unless it be out of reason.

Lempie vs. United States (9th Circuit), 39 Fed. (2) 19.

(2) The question of intent with which an act is done is solely one for the jury.

11 Amer. Jurisprudence 571.

(3) A conspiracy having been formed, each of the conspirators is liable for the unlawful act of one done in furtherance of it, though he is not familiar with the details of the particular unlawful act at the time it is committed.

United States vs. Sweeney, 95 Fed. 451.

United States vs. Kane, 23 Fed. 751.

(4) Possession of the fruits of a crime immediately or soon after its commission is in itself substantial evidence to support a verdict.

Wilson vs. United States, 162 U. S. 613.

Degnan vs. United States, 271 Fed. 293.

CONCLUSION

Applying the foregoing rules to the facts in this case, we believe there is ample evidence to justify the finding of the jury that the appellant had full knowledge of the method by which the various checks were obtained. But

even if he did not have complete knowledge of this method, he certainly knew that the checks had been obtained by means of a fraudulent scheme and possessing such knowledge he aided in the execution of that scheme. It is our understanding of the law that this evidence is ample to render him guilty of the crime charged.

A rehearing in this cause is respectfully and earnestly petitioned in the interest of justice.

Respectfully submitted,

CARL C. DONAUGH,
United States Attorney for
the District of Oregon.

J. MASON DILLARD,
Assistant United States Attorney,

M. B. STRAYER,
Assistant United States Attorney,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the attorneys for appelle, United States of America, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for rehearing is not interposed for delay.

J. MASON DILLARD,
Assistant United States Attorney.